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ORIGINAL

NO. 87-1725

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

VS.

GEORGE CORDOVA,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

WHETHER A STATE TRIAL COURT IS REQUIRED TO INSTRUCT THE JURY ON A LESSER INCLUDED OFFENSE IN A CAPITAL CASE WHERE THERE IS SUFFICIENT EVIDENCE, EITHER DIRECT OR CIRCUMSTANTIAL, WHICH WOULD SUPPORT A CONVICTION ON THE LESSER OFFENSE.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now Comes GEORGE CORDOVA, Respondent in the above styled and numbered cause, and files this his Brief in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and would show the Court as follows:

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Texas Penal Code provides that a person commits the offense of murder if he intentionally or knowingly causes the death of an individual. TEX. PEN. CODE ANN. §19.02(a)(1) (Vernon 1974).

The Texas Penal Code further provides that a person commits the offense of capital murder if he commits murder as defined under §19.02(a)(1) of the Penal Code and the person intentionally commits murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, or arson. TEX. PEN. CODE ANN. §19.03(a)(2) (Vernon 1974).

The Texas Penal Code further provides that if the jury does not find beyond a reasonable doubt that the defendant is guilty of capital murder, the defendant may be convicted of murder or any lesser included offense. TEX. PEN CODE ANN. §19.03(c) (Vernon 1974).

The Texas Penal Code further provides that a person commits the offense of robbery if, in the course of committing theft, and with the intent to obtain and maintain control of the property, he intentionally, knowingly or recklessly causes bodily injury to another. TEX. PEN. CODE ANN. §29.02 (Vernon 1974). The Penal Code provides that "in the course of committing theft" means conduct that occurs in an attempt to commit, during the commission, or immediate flight after the attempt or commission of theft. TEX. PEN. CODE ANN. §29.01(1) (Vernon 1974).

The Texas Code of Criminal Procedure provides that an offense is a lesser included offense if:

> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) it differs from the offense charged only in the respect that less serious injury or risk of injury to the same per-

son, property, or public interest suffices to establish its commission;

(3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or

(4) it consists of an attempt to commit the offense charged or an otherwise included offense. TEX. CODE CRIM. P. ANN art. 37.09 (Vernon 1981).

STATEMENT OF THE CASE

Early on the morning of August 4, 1979, a person alleged to be Respondent approached the car occupied by Jose Hernandez and Cynthia West and asked for some oil (State's Record, hereinafter S.R. VIII, pp. 2671-2). This person left after being told that Hernandez and West had no oil (S.R. VIII, p. 2673). A short time later, four individuals approached the car and asked Hernandez and West to take them to get some gasoline (S.R. VIII, p. 2675). Two of these individuals were alleged to be Respondent and Manuel Villanueva (S.R. VIII, p. 2676). When Hernandez refused to aid the four, one reached in and struck Hernandez on the left side of the face (S.R. VIII, p. 2680). West, the only eyewitness, did not see who struck Hernandez or if he was struck with a fist or knife (S. R. VIII, p. 2681). Someone unlocked the car door whereupon the person alleged to be Respondent and Manuel Villanueva allegedly continued the assault on Hernandez, but West did not see if the assailants were hitting him with any thing (S.R. VIII, p. 2682). West was pulled from the car, taken to a wooded area and raped (S. R. VIII, pp. 2684-8). She did not see the car again after she was taken from it (S.R. VIII, p. 2707) nor did she observe the person alleged to be Respondent or Villanueva after they left her (S.R. VIII, pp. 2689-90). The person alleged to be Respondent was al-

legedly carrying a tire tool while Manuel Villanueva had a knife (S.R. VIII, p. 2683). Dr. Swedavky testified that Jose Hernandez had lacerations, bruises and cuts in and about his head, legs and shoulders (S.R. IX, pp. 2903-4). He further testified that a tire tool, which had been identified as being like the one allegedly carried by the person alleged to be Respondent could have cause some of the wounds on Hernandez and could have caused death (S.R. IX p. 2912). He further testified that the injuries to Hernandez which might have been made by the tire tool would not have been death producing nor would it have caused the stab wounds (S.R. IX, p. 2914). The fruits of the alleged robbery were shown to have been in the possession Manuel Villanueva, these being Hernandez' wallet (S.R. VIII, p. 2581-3), his tape box (S.R. VIII, pp. 2583-4, 2839), and his watch (S.R. VIII, pp. 2581-3, 2845-7). No property belonging to the deceased was found in the possession of Respondent.

SUMMARY OF THE ARGUMENT

Respondent strongly contends that the reasons advanced by Petitioner herein are not sufficient to justify the exercise by this Court of its discretionary authority on petition for writ of certiorari and that the Honorable Court of Appeals was correct in holding that Respondent was entitled to a charge on the lesser-included offense of murder for the reasons set forth in its opinion.

Petitioner claims that the decision of the Court of Appeals constitutes and unwarranted extension of this Court's holding in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). Respondent contends that the Court of Appeals correctly relied on Beck in reaching its decision and that Respondent was

clearly entitled to a charge on the lesser included offense of murder as a matter of due process under the Constitution of the United States.

In holding that Respondent was not entitled to a charge on the lesser-included offense of murder, the Court of Criminal Appeals of Texas reiterated its oft-cited test regarding such instructions: (1) the lesser offense must be included in the proof of the greater offense and (2) there must be some evidence in the record that if the defendant is guilty, he is guilty only of the lesser offense. Cordova v. State, 698 S.W.2d 107 (Tex. Crim. App. 1985).. It is the second prong of the test which the Court of Criminal Appeals held was not satisfied. In ruling that Respondent was not entitled to the instruction, the Court of Criminal Appeals stated that "[t]he fact that the State in proving capital murder may also have proved a lesser offense does not entitle a defendant to a charge on the lesser offense." Id. at 113.

Furthermore, the Court of Criminal Appeals, citing previous cases, held that, in effect, it is incumbent upon the defendant to produce the evidence which will authorize an instruction on a lesser-included offense. Id. Adherence to this requirement flies in the face of the clearly enunciated language set forth in Lugo v. State, 667 S.W.2d 144 (Tex. Crim. App. 1984); constitutes an unconstitutional shifting of the burden of proof; and patently violates the requirements of the Fifth, Sixth and Fourteenth Amendments. As the Court will note, in its question presented, Petitioner seeks to propagate this injustice by requiring "affirmative" evidence that the Defendant is guilty only of the lesser offense. This "question" is not based upon the requirements of federal due process as enunciated by this Court in Beck, supra, and Keeble v. U.S., 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973)

but in fact tries to implant the Texas rule on the U.S. Constitution.

Contrary to Petitioner's claim that the Court of Appeals "implies" that the state standard is "indistinguishable" from the federal standard, the Court of Appeals says no such thing. What it does say is that they "seems very similar to the federal standard." Cordova v. Lynaugh, 838 F.2d 764, 767 n.3 (5th Cir. 1988). The state standard is set forth above. The federal standard requires a trial court to give a charge on a lesser offense "if the evidence would permit a jury rationally to find [a defendant] guilty of the greater." Id.

In the instant case, the State called Cynthia West and established the assault on Hernandez and the rape of West. Any evidence of a robbery of Hernandez was purely circumstantial, said evidence showing only that certain items of property were later found in the possession of Respondent's companion. As held by the Court of Appeals, the jury could have found no agreement to rob Hernandez on the part of Respondent and his companions. Accordingly, there was more than just "some" evidence that would support a verdict of murder only by the jury in this case.

Petitioner claims that the intent of Respondent's accomplices to rob Hernandez is unquestioned and that "[n]o rational juror could conclude that Cordova and his accomplices did not agree to attack the deceased for that purpose." Pet. at 7. Respondent would contend that this type of determination, especially in capital cases, is the basis for giving an instruction on a lesser offense. Because such a charge was not given, it cannot be said what a rational juror would or would not have found. The only question is whether or not such a juror could have found Respondent guilty of only murder based on the evidence presented to the

jury. Due process requires that the jury be given the opportunity to decide for itself in such cases, hence the necessity for the instruction.

Petitioner lastly contends that the Court of Appeals failed to "defer" to state court interpretations of state law and accord trial court findings a presumption of correctness. Respondent's argument is that the federal courts are not bound by state court interpretations where federal constitutional questions are raised, especially where the decision of the trial court and the state appellate courts rested solely on state statutory grounds and not upon federal constitutional grounds.

REASONS FOR DENYING THE WRIT

THE OPINION BY THE COURT OF APPEALS BELOW CORRECTLY APPLIES THE STANDARD SET FORTH IN BECK V. ALABAMA AND ACCORDS PROPER DEFERENCE TO THE STATE COURTS' FINDINGS AS REQUIRED BY 28 U.S.C. §2254(d).

A. The Court of Appeals opinion correctly sets forth the requirements for the giving of a lesser offense charge in capital cases.

The Supreme Court of the United States has stated that construction of a statute to preclude an instruction on lesser included offenses raises difficult constitutional questions. Keeble v. U.S., 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973). As stated in Keeble:

> "A defendant is entitled to a lesser included offense instruction - in this context or any other - precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some some offense, the jury is likely to resolve its doubts in favor of conviction . . . . Since the nature of pe-

> titioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant . . . or acquitting him outright. We cannot say that the availability of a third option - convicting the defendant of simple assault - could not have resulted in a different verdict.

Keeble v. U.S., 412 U.S. 205, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) is persuasive that this construction of legislative intent is correct. In Keeble, the government contended that the defendant was not entitled to a lesser included offense charge because the lesser offense was not contained in the statute. The Supreme Court disagreed stating that "we can hardly conclude that Congress intended to disqualify Indians from the benefits of a lesser offense instruction, when those benefits are made available to any non-Indian charged with the same offense." Id. at 212.

As stated in Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980):

> "While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule . . . establishes the value to the defendant of procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense - but leaves some doubt with respect to an element that would justify conviction of a capital offense - the failure to give the jury the 'third option' of convicting on a lesser included offense would inevitably to enhance the risk of an unwarranted conviction.
>
> "Such a risk cannot be tolerated in a case in which the defendant's life is at stake. . . .It is of vital importance to the defendant and the community that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion.
>
> "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination.

> The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [the State] is constitutionally prohibited from withdrawing that option from the jury in a capital case [emphasis added]." Id. at 637-8.

Keeble and Beck are highly persuasive, if not controlling, that the purpose of §19.03(c) is to avoid those procedural pitfalls proscribed by the Supreme Court in those cases. If a capital murder defendant, as in the instant case, is guilty of some violent crime but not of capital murder and the jury is precluded from considering this fact at the guilt-innocence phase of the trial, the the jury is impermissibly bound to either convict or acquit of capital murder. Inasmuch as all capital murder cases tend to shock the sensibilities of the jury, it is more likely than not that the jury will convict the defendant rather than set him free. See e.g. Beck, supra, at 642.

As aptly stated by the District Court in its order:

> "The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free ....The goal of the Beck rule, in other words is to eliminate the distortion of the fact finding process that is created when the jury is forced into an all or nothing choice between capital murder and innocence [emphasis added]." Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154 (1984).

Spaziano v. Florida, supra, cited by Petitioner, supports Respondent's position. In Spaziano, the trial court offered to instruct the jury on lesser included offenses if the accused would waive the statute of limitations thereon. 468 U.S. at 450. After the accused refused to waive limitations, the trial court instructed the jury only on capital murder, an act which was not found to be error. Id. at 457. In so holding, this Court stated

that "[r]equiring that the jury be instructed on a lesser included offense for which the defendant may not be convicted . . . would simply introduce another type of distortion into the fact finding process." Id. at 455-6. This Court then "reaffirm[ed] our commitment to the demands of reliability in decisions involving death and the defend ant's right to the benefit of a lesser included offense instruc tion that may reduce the risk of unwarranted capital convictions [emphasis added]." Id. at 456.

Petitioner's reliance on Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982) is likewise misplaced and, in all likelihood, is more persuasive of Respondent's argument in support of the opinion of the Court of Appeals. As stated in Hopper:

> "Our opinion in Beck stressed that the jury was faced with a situation in which its choices were only to convict the defendant and sentence him to death or find him not guilty. The jury could not take a third option of finding that although the defendant had committed a grave crime, it was not so grave as to warrant capital punishment. We concluded that a jury might have convicted Beck but also rejected capital punishment if it believed Beck's testimony. On the facts shown in Beck, we held that the defendant was entitled to a lesser included offense instruction as a matter of due process [emphasis added]." Id. at 609.

The argument also advanced by Petitioner that the opinion of the Court of Appeals will eliminate the rationality requirement of Keeble and Hopper. Pet. at 12. This is clearly not the case. Hopper itself is an example of the situation where there is evidence which would support the denial of an instruction on a lesser offense. In Hopper, evidence of the crime was found in the possession of the accused and the accused testified that he had shot the deceased several times, that he had no intention of reforming,

and that he would return to a life of crime if set free. 456 U.S. at 606-7.

In the instant case, the issue which elevates the crime of which Respondent was charged was whether or not the killing took place in the course of committing robbery of Joey Hernandez. Had the jury found no prior or contemporaneous agreement to rob or no robbery but merely a theft, it would have been justified in finding of Respondent guilty of murder, not capital murder.

In a capital case, the existence of the aggravating action is a question of fact which, in the interest of justice, due process and equal protection, the jury must be allowed to pass upon. The failure of the trial court to charge the jury on murder is a refusal to allow the jury to determine a crucial, life-or-death question in violation of constitutional guarantees.

Contrary to Petitioner's contention, the Court of Appeals did not misconstrue the law of parties of the State of Texas. The Court of Appeals quotes the Texas Court of Criminal Appeals statements regarding the law of parties as set forth in their opinion in Respondent's case. Cordova v. Lynaugh, 838 F.2d 764, 768-9 (5th Cir. 1988). Thereafter, the Court of Appeals discussed at length the evidence and Respondent's alleged participation in the crime charged both as a principal and as a party. Id. at 769-70.

In view of the fact that the aggravating element of the offense, namely the fact of whether or not the killing occurred in the course of a robbery, was still in doubt, it cannot be said that Respondent received a fair determination of his guilt at his trial for capital murder, nor can it be said that a charge on the lesser included offense of murder could not have resulted in a different verdict.

It is clear from the foregoing that Respondent has been unconstitutionally denied due process and equal protection of the law as required by the Fifth and Fourteenth Amendments and has suffered the imposition of cruel and and unusual punishment as a result of the trial court's refusal to charge the jury on the lesser included offense of murder from both the substantive and procedural standpoints condemned in Keeble and Beck, supra. See also and cf. Lockett v Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L. Ed.2d 973 (1978).

Under all the fact presented, Petitioner's Petition for Writ of Certiorari should be denied or, in the alternative, the Court of Appeals should be, in all things, denied.

B. The Court of Appeals opinion correctly applied the law of parties as established by the State of Texas in deciding whether Respondent was denied due process and therefore reversal is not mandated.

Petitioner lastly contends that the Court of Appeals failed to "defer" to state court interpretations of state law and accord trial court findings a presumption of correctness. Respondent's argument is that the federal courts are not bound by state court interpretations where federal constitutional questions are raised, especially where the decision of the trial court and the state appellate courts rested solely on state statutory grounds and not upon federal constitutional grounds.

Petitioner cites numerous cases which he claims indicate that the Court of Appeals erred in not deferring to the Court of Criminal Appeals of Texas. In each of the cases cited, the courts of the states involved based their decisions on finding by the trial

courts entered into the record. As such, these cases are inapposite to that before the Court today. In Texas, the trial court makes findings of fact only in certain instances. See e.g. TEX. CODE CRIM. P. ANN. art. 38.22 (Vernon 1976) (trial court required to enter findings of fact and conclusions of law regarding the voluntariness of confessions). In virtually all other cases, the jury is the finder of fact and does so by entering a general verdict, unless there are special pleas. TEX. CODE CRIM. P. ANN. art. 37.07 (Vernon 1981).

In the instant case, no finding was made by the trial court regarding the sufficiency of the evidence. All that occurred was that counsel for Respondent objected to the failure of the trial court to instruct the jury on the lesser offenses of murder and aggravated assault, which objection was overruled.

As raised in the preceding issue, the question regarding Respondent's culpability is whether or not a robbery occurred. If no robbery occurred, then Respondent is not liable for capital murder. Likewise, if no agreement was in effect to rob the deceased, then Respondent is not liable for capital murder. Finally, if Respondent did not act with intent to promote a killing in the course of a robbery, then Respondent is not guilty of capital murder as a party. The Court of Appeals correctly construed Texas law in reaching the decision regarding the law of parties.

There is, however, one other point which should be raised. When deciding questions of federal constitutional law, the federal courts are not bound by state court determinations. See Townsend v. Sain, 372 U.S. 293, 319, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Due process is a question of federal law, implicating federal constitutional rights which are controlled by federal law. See e.g.

Brookhart v. Janis, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

The Court of Criminal Appeals has acknowledged this principal and has held that those rulings of the Supreme Court which implicate federal constitutional questions are binding on the state courts. As stated in Carlsen v. State, 654 S.W.2d 444 (Tex. Crim. App. 1983):

> "Although Jackson [v. Virginia] was setting a standard for review of state convictions by federal courts, the due process requirements that it announced were based expressly on the Fourteenth Amendment. They are binding on the states and constitute a minimum standard for our sustaining a conviction." Id. at 449.

Beck and its progeny are premised on the Fourteenth Amendment and are therefore binding on the state courts under Carlsen.

Respondent would assert that, in applying federal law to state court determinations, different conclusions may be reached in order to determine whether or not federal constitutional mandates have been violated without doing violence to the provisions of 28 U.S.C. §2254. The participation of Respondent in a robbery is open to question when viewed under the federal standard.

Respondent would further contend that, in light of Petitioner's argument regarding the crimes which Respondent is allged to have commited, it is possible that the determination of the Court of Criminal Appeals is likewise slanted. In his petition, Petitioner claims that "here the only 'arguable' doubt set forth by the court below is whether Cordova committed murder during the course of committing robbery or rape, which are both capital offenses. . . . [t]o have allowed the jury to convict Cordova of simple murder, which the evidence did not support, would not promote the rationality contemplated by Beck and its progeny." Pet. at 15 n.8. It may be just as likely that the Court of Criminal

Appeals viewed the matter in the same light, i.e. Respondent committed one capital crime or another so affirmance is in order regardless of the evidence. Such an attitude is inconsistent with the requirements of due process.

In considering the law of parties in Texas and in considering the facts adduced at Respondent's trial in light of the federal standard regarding lesser offenses, the Court of Appeals held correctly that Respondent was denied due process by the failure of the trial court to instruct the jury on the lesser offense of murder.

CONCLUSION

For the reasons set forth above, Respondent respectfully prays the Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit; or, in the alternative, that said Court be, in all things, affirmed.

Respectfully submitted,

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